IS THERE A FEDERAL POLICE POWER?[1]

In beginning my remarks upon such a subject, it is perhaps well for me to forestall, if not to disarm, criticism, by reminding you of what that distinguished and lamented law writer, Professor Thayer, said on the subject:

"Discussions of what is called the police power," says the learned Professor in a note to his Cases on Constitutional Law (Vol.I, p. 693) "are often uninstructive, from a lack of discrimination," and he adds: "It is common to recognize that the subject is hardly susceptible of definition, but very often, indeed, it is not perceived that the real question in hand is that grave, difficult, and fundamental matter,—what are, the limits of legislative power in general? In talking of the 'police power,' sometimes the question relates to the limits * * * between the local legislative power of the States and the Federal legislative power. * * * But often, the discussion turns upon the true limits and scope of legislative power in general,—in whatever way it may seek to promote the general welfare."

Before touching upon the limits between the power of the States and the Federal power, it may be well to attempt a statement of the police power itself, however perilous this may be.

The police power has its foundation in the right and duty of the Government to "secure the general comfort, health and prosperity of the State,"[2] to preserve domestic order,[3] to maintain a system of internal regulation in order to insure such domestic order and secure to each citizen the enjoyment of his rights.[4] It is based on the great principle of securing the public safety and involves the protection of the lives, limbs, health and quiet of the person, and the security of property. It is co-extensive with self-protection; it is the law of overruling necessity, it is inherent in the State and plenary, and enables it to prohibit all things hurtful to the comfort and welfare of society.[5] I may well con-

[1] Address delivered before the Dwight Alumni Association, New York, March 4th, 1904.

[2] Redfield, C. J., in Thorpe *v.* R. & B. R. Co. (1854) 27 Vt. 140.

[3] Blackstone IV, 162. [4] Cooley Const. Lim. 572.

[5] Lake View *v.* Rose Hill Cem. Co. (1873) 70 Ill. 191.

clude with the quaint and comprehensive definition of Blackstone:[1]

> The due regulation and domestic order of the Kingdom, whereby the individuals of the State, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners; to be decent, industrious and inoffensive in their respective stations."

The police power is therefore very evidently the power of the people for self-protection, the protection of the whole against any of its number, and its exercise is of necessity confided to the government—the State into which the people have organized themselves. The same reasoning would seem to indicate that when various peoples have formed themselves into States possessing the powers indicated, and then for the general purposes of a common intercourse and union, have organized these States into a federal union on the basis of a constitution which enumerates the powers to be exercised by the federal government, this inherent and plenary power to control the lives, liberty and property of the citizens within the various States does not pass to such general government unless specifically enumerated. Especially must this be so when we find as the basis of such a union the constitutional provision:

> "That the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people," and that, "the enumeration of certain rights do not disparage others retained by the people."[2]

In other words the power is inherent in the State and in its people. Whatever constitution the people may frame is but a regulation and apportionment of their powers among the agencies of government created,—while the Constitution of the United States is a grant of powers to the Federal Government from the people of the various States who framed it and approved it, in the terms of which grant is to be found the only authority for federal action.

> "The Government of the United States," said the Supreme Court, through Mr. Justice Story, "can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."[3]

[1] Blackstone IV, 162. [2] Cooley Const. Lim. 10, 11.
[3] Martin *v.* Hunter, (1816) 1 Wheat. 326.

The extent to which such police power may be exercised is aptly stated by the Supreme Court in this language:

"It is thoroughly established in this Court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws (by the State), * * * are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury." [1]

The act under consideration was a statute of Connecticut compelling the city of Hartford and a railroad corporation to acquire certain rights of laying new railways and highways, and to so relay certain highways and railways as to do away with a grade intersection, and the court, in answer to the contention that the requirement was unreasonable and not justified by the necessity invoked, replied that the legislature was exercising a right within the police power of the State, and that such exercise could not be reviewed upon any "general ideas of the requirements of natural justice."

"It is a power of self-preservation and was never intended to be surrended" is the language of Chief Justice Taney in Passenger Cases.[2]

Manifestly no such power as is defined and sustained in these cases, is in terms vested in the federal government by the Constitution. If such power can be lawfully exercised by the Congress of the United States, it must be under the doctrine of implied powers, to be inferred from the necessity which arises for its use, in order effectually to carry out other express powers, such as the power over the mails, post offices and post roads, or the power to regulate commerce among the States or with foreign countries.

If we examine into the origin of the commerce clause, we will find that the germ of that provision rather suggests that the States did not intend therein to surrender the exercise of any of the power they possessed within their

[1] N. Y. R. R. Co. *v.* Bristol (1894) 151 U. S. 556.

[2] (1849) 7 How. at p. 470.

local jurisdictions. The resolution of Edmund Randolph (May 29, 1787) offered in Convention was:

"That the National Legislature ought to be empowered to enjoy the legislative right vested in Congress by the Confederation; and, moreover, to legislate *in all cases to which the separate States are incompetent*, or in which the harmony of the United States may be interrupted *by the exercise of individual legislation.*" [1]

The legislative right vested in Congress by the Confederation was to regulate coin, the standard of weights and measures, all affairs and trade with Indians "not members of any State," establishing post offices from one State throughout the others, all with the proviso that "*the legislative right of a State within its own limits should not be infringed or violated.*" [2]

STATE RIGHTS.

That it was not intended to abandon to Congress any police power of the State is indicated by the fact that "exclusive" power is not conferred upon Congress, and that where the power of the States was to be curtailed, express prohibitions were put upon them.

"Notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States." [3] The comment upon this by Chief Justice Taney is: "The grant of a general authority to regulate commerce, is not therefore a prohibition to the States to make any regulation of it within their own territorial limits not in conflict with the regulations of Congress." [4]

The importance of the preservation of the State autonomy in all that concerns its internal relations,—in everything that does not trench upon national unity, nor disturb the smoothness of relations indispensable to a happy and peaceful growth of the nation, is illustrated by frequent utterances of our highest court.

"In discussing these questions the conflicting powers of the general and state governments must be brought into view and the supremacy of their respective laws, when they are in opposition, must be settled.

See, however, Pinckney's Plan, May 29, 1787, 1 Ell. Debates, 147; said by Bancroft not to have been read. Vol. VI, Rev'd Ed.

[1] 1 Ell. Debates, 144. [2] Arts. of Conf., IV, VI, IX.

[3] Federalist No. XXXII. [4] Passenger Cases (1849) 7 How. 471.

"No political dreamer was ever wild enough to think of breaking down the lines which separated the States and of compounding the American people into one common mass."

This is the language of Marshall in McCulloch *v.* Maryland.[1]

"Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States and to confer additional power on that of the Nation.

"But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this Court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts."

This is taken from the opinion of Justice Miller in the Slaughter House Cases.[2]

With this much by way of preface, let us return to the language of the Constitution and see whether we can there find, and where we can there find, the origin of the exercise by the federal government, of that flexible and almost untrammelled authority over the lives and property and well-being of the individual, known as the Police Power.

Art. I of the Constitution, which deals with legislative powers, Sec. 8, provides that:

"The Congress shall have power to lay and collect taxes, to borrow money," etc., and "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;

"To establish post offices and post roads."

Foreign commerce is necessarily national in character and must naturally be dealt with by the national authority. This is especially true when we consider that among the prohibitions which the States willingly enacted against themselves, in the formation of the Constitution, is one that

"No State shall enter into any treaty, alliance or confederation;" and that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports," etc., and that "no State shall, without the consent of Congress, lay any duty of tonnage or enter into any agreement or compact with another State or with a foreign power."[3]

[1] (1819) 4 Wheat. 315. [2] (1872) 16 Wall. 36. [3] Art. I, Sec. 10.

But all this is not equally true of domestic commerce between the States. The evil to be remedied or the danger to be avoided with such commerce, was the power of one State to tax the products of another, or to tax the products of one State destined for use or consumption in another, or products passing from one State for use in another; this it will readily be seen could easily be done by the seaport States through which merchandise must pass before reaching any other. This last named evil might be reached in part through the regulation of foreign commerce, but all other discriminations by one or more States against the other could be avoided only by consigning to Congress the regulation of such commerce, and such was evidently the principal purpose of this clause, which placed in one common legislature the protection of the various States, each from the other.

The clause in itself is indeed but a skeleton; it does not indicate when the power given shall lie exclusively with Congress or concurrently with Congress and the States; it does not provide when, if such power is concurrent, one authority must yield to the other; when, if at all, the powers thus given to Congress may overreach the reserve powers of the States; all this was left to development and evolution.

It was not until 1824 that the Supreme Court was called upon to determine the serious question as to the extent of the power vested by this clause in the federal legislature, and then in the case of Gibbons *v.* Ogden,[1] passing upon the validity of an exclusive privilege granted by the State of New York for the navigation of its waters by steam vessels, the court first defined the nature and character of the dominion of Congress over commerce as an "indivisible dominion" which could not be shared without impairment and destruction. As a consequence it was held that if the exercise of any power by any other sovereignty interfered with that dominion, it must stand aside and be subordinate, else the dominion of Congress was illusory and vain. Two independent sovereignties could not exercise simultaneous control over one object. Taxation was instanced as an example of a power which might be con-

[1] (1824) 9 Wheat. 1.

currently exercised by two sovereignties; each might, without interference with the other, exact a contribution from given property for the respective support of each of the governments interested. But regulation of commerce, it was aptly said, could not be effected by two opposing regulating authorities, and the right of the State of New York to grant an exclusive privilege for the navigation of its waters, when these waters were the means of inter-communication between States or were navigable ways necessary to foreign commerce, was therefore extinguished by the grant of power to Congress.

This was followed a few years later by a decision which determined that a State could not impose a license fee as the condition of permitting an importer to sell his imported goods, and that the right of importation was under the regulation of foreign commerce, which rested in Congress under the Constitution, and that such regulation was interfered with if the importer could not sell what he had been permitted to bring in, except upon conditions imposed by the States.[1]

So far the exercise of the power seems to be confined to the initial purposes of the constitutional grant, but in 1829 a case arose involving the question whether the right of a State to dam a navigable creek, apparently for the purpose of draining its marsh lands, and therefore clearly in the exercise of the police power which controls the sanitary regime of a community, was a rightful exercise of such power or whether such power was extinguished by the grant to Congress of control over inter-state and foreign commerce, and the consequent right to regulate the navigable waterways of commerce. In that case the court sustained the right of the State to erect the dam, holding that it had not encroached upon the right of dominion conferred by the commerce clause upon Congress, because Congress had taken no action which asserted that the unimpeded navigation of the creek was necessary to the freedom of commerce, and until such action was taken by Congress the State could exercise its reserved powers in utilizing it as it considered most advantageous to its own community.[2]

[1] Brown *v.* Maryland (1827) 12 Wheat. 419.

[2] Wilson *v.* Blackbird Creek Marsh Co. (1829) 2 Pet. 245.

While this case indicates some wavering from the position of the two earlier cases just noticed, which held the power of commercial regulation to be incapable of division, it was the beginning of the assertion of a position which, if followed up, might materially encroach upon the police powers of the State, if not indeed ultimately transfer a large portion of such powers to the federal government; for this case recognized the possibility that a State would be rendered powerless to exercise the important police power of sanitation for the benefit of its own community whenever Congress chose to assert its power of commercial regulation over the navigable streams which were sources of disease within a particular State. The language of the Court in that case illustrates this possibility:

"The value of the property on its banks [the Delaware] must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States.

"But the measure authorized by this act stops a navigable creek and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

"If Congress had passed any act which bore upon the case,—any act in execution of the power to regulate commerce, etc.—we would feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act."[1]

This may be contrasted with the language of Justice Nelson in Collector *v.* Day,[2] to the effect that none of the reserved powers of the States should be interfered with by Congress. The grant of the power of taxation is most complete, involving as you are aware the power to destroy.[3] Yet it was held that it could not be exercised against the salary of a State judicial officer—a reserved right of the State being to have courts. In reading that decision the question is naturally suggested, how then can the power under the commerce clause be used to hamper the police

[1] Wilson *et al. v.* Blackbird Creek Marsh Co. (1829) 2 Pet. 245.

[2] (1870) 11 Wall. 124, 125.

[3] McCulloch *v.* Maryland; Veazie Bank, 8 Wall. 523.

power of the State in protecting the health of its inhabitants by draining its marshes, this police power being, as was stated by Mr. Chief Justice Marshall,

"a portion of the immense mass of legislation which embraces everything within the territory of a State, not surrendered to the General Government; all which can be most advantageously exercised by the States themselves."[1]

A later case[2] put the question in another form, to wit, that the power over commerce was so exclusively vested in Congress that no part of it could be exercised by a State; but in reality the decision in the Blackbird Creek case was based upon the theory that in damming the creek to reclaim marsh lands, the State was not regulating commerce, although the creek was a commercial waterway, but only exercising for sanitary purposes its reserved police power; and that whenever the regulation of foreign commerce required the freedom of the waterway the right of such commercial freedom placed in the custody of Congress was supreme even over the police power of the State, which in such case must give way.[3]

In New York *v.* Miln[4] the court sustained as a valid exercise of police power and not a regulation of commerce, the law of the State of New York requiring a report from incoming vessels as to their passengers; the law, it was said, did not impede commerce but exacted only such information in reference thereto as was requisite for the proper protection of the State; but in the Passenger Cases[5] where the State law went farther and imposed a tax upon passengers coming into port, a divided court held that this trenched upon the exclusive privileges of Congress and was a regulation of commerce; and this although the tax was meant simply to cover the expense of the due inspection of the passengers in the exercise of the acknowledged police power of a State for the protection of its inhabitants. It is to be noted that there was a great divergence of views among the various members of the Court in reaching this decision and this was likewise the case in the decisions

[1] Gibbons *v.* Ogden (1824) 9 Wheat. 1.
[2] State Freight Tax (1872) 15 Wall. 232, 279.
[3] See Wheeling Bridge Case (1851) 13 How. 556.
[4] (1837) 11 Pet. 102. [5] (1849) 7 How. 282, 423.

known as the License Cases,[1] where the laws of various States requiring licenses of importers of liquors, was under consideration, and there the right of a State to exact a license from an importer of liquors as a condition to the disposal of his goods, though brought in from another State, was upheld.

The views of the several members of the Court here were to these various effects:

That although the law was a regulation of commerce, it was valid because not in conflict with any legislation of Congress; that the right to import goods did not include the right to sell them within a State which prohibited the sale; that the law was an exercise of the reserve police power of a State which is paramount to all others; and finally that although the power of regulation is exclusively in Congress as to matters affecting several States, there are things in connection with foreign commerce which are local to each State, such as the control of wharves, anchorage, harbor obstructions, besides the police powers of sanitation, all of which local matters may be regulated by States until Congress takes action in conflict with such regulations.

Mr. Justice Woodbury expressed these last mentioned views and repeated them in a dissenting opinion in the Passenger Cases and his opinion was afterwards adopted by the court in the case of Cooley *v.* Port Wardens,[2] where it was held that the exclusive congressional power related solely to subjects of such a nature that only congressional legislation could properly reach them. The regulation of commerce, it was there said, covers a vast field of many and various subjects, some demanding a uniform rule operating equally within every port and some as imperatively demanding diversities according to local necessities.

Under this rule local powers, such as inspection, pilotage, port regulations, improvements of harbors, &c., may be exercised by the State as local powers; but again these local powers are held subject to extinction whenever the action of Congress chooses to supersede them in the carrying out of its general powers of regulation.

Then followed cases which gradually undermined the

[1] (1846) 5 How. 504. [2] (1851) 12 How. 310, 319.

principle laid down in the Blackbird Creek case and established the rule that inaction of Congress with reference to matters not of local jurisdiction but demanding uniform regulation throughout the country was equivalent to a declaration that interstate commerce, in respect to such matters, should remain free and untrammelled.[1] As pregnantly expressed by Mr. Justice Clifford:

"The silence of Congress as to what it does not do is as expressive of what its intention is as the direct provisions made by it."[2]

The establishment of this rule has led to innumerable cases which turn upon its proper application; in other words—what matters are local in their nature and what matters call for a uniform regulation.

In one case[3] it was said that the test was whether the action of the State was discriminating as against other States, or was productive of conflicting regulations, the purpose of the commerce clause being to secure commerce against such drawbacks.

In another case,[4] already referred to, the court held invalid a Pennsylvania law taxing all freight carried within the limits of the State, holding that as the law reached all traffic going through the State from points outside of it, it was an interference with inter-state traffic, thus applying to freedom of transportation the rule laid down in Crandall *v.* Nevada,[5] as to freedom of personal transit.

And later this was confirmed,[6] when the court held that a discrimination against outside commerce was not necessary to constitute an interference, and that though a tax upon domestic commerce were imposed, it could not reach inter-state commerce, which was totally free from State interference.

In the case of the Gloucester Ferry Co. *v.* Pennsylvania,[7] the plaintiff, a company incorporated by the Legislature of New Jersey to run a ferry between Gloucester

[1] Welton *v.* Missouri (1875) 91 U. S. 282; Hall *v.* DeCuir (1877) 95 U. S. 485, 490, and Crandall *v.* Nevada (1867) 6 Wall. 35, 42.

[2] Hall *v.* DeCuir (1877) 95 U. S. 499.

[3] Mobile *v.* Kimball (1880) 102 U. S. 691, 697.

[4] State Freight Tax (1872) 15 Wall. 232, 237. [5] (1867) 6 Wall. 35.

[6] Robbins *v.* Taxing District (1887) 120 U. S. 489, 494.

[7] (1884) 114 U. S., 196.

in that State and Philadelphia, protested against a tax imposed by Pennsylvania upon foreign corporations doing business in that commonwealth, the tax to be computed upon the dividends declared by the company. The Supreme Court held that this was an interference with interstate commerce and beyond the powers of the State to exact. In this case the court, speaking by Mr. Justice Field, endeavors to make a distinction which would preserve to the State certain powers, &c., and recites that

"the power to prescribe regulations to protect the health of the community, and prevent the spread of disease, is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce."[1]

And he adds that:

"Independently of such measures, the State may prescribe regulations for the government of vessels whilst in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes."[2]

But that in the exercise of *these latter powers* the State is subject to the commercial power of Congress, which may at any time supersede the State action whenever State regulations interfere with the congressional prerogatives, and to this he adds:

"It was not intended, however, by the grant to Congress to supersede or interfere with the power of the States to establish police regulations for the better protection and enjoyment of property. Sometimes, indeed, as remarked by Mr. Cooley, the line of distinction between what constitutes an interference with commerce and what is a legitimate police regulation is exceedingly dim and shadowy."[3]

And Mr. Cooley adds:

"It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions if it shall be deemed advisable, and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution; but as the general police power can better be exercised under the provisions of the local authority, and mischiefs are not likely to spring therefrom so long as the power to

[1] p. 214 Compare with Blackbird Creek Case, *supra* pp. 9-11.
[2] p. 214. [3] p. 215.

arrest collision resides in the National Congress, the regulations which are made by Congress do not often exclude the establishment of others by the State covering very many particulars."[1]

It may be remarked that the line of distinction is certainly dim and shadowy when so great a constitutional authority as Judge Cooley does not venture to state it more definitely than to suggest that the regulations of Congress "do not often exclude the establishment of others by the State."

I will continue the quotation from this interesting opinion:

"The power of the States to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges. In Gibbons *v.* Ogden, Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of a State not surrendered to the general government."[2]

Upon this broad statement of Chief Justice Marshall the court comments thus:

"But in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country."[3]

This may indeed be so as to ferries, but what explanation shall we make as to the inspection laws, quarantine laws, health laws, which are brought into action with reference to arrivals within a State from States or countries outside of it.

In the case of Bowman *v.* Chicago Ry. Co.,[4] the delimitation of the police powers was again the subject of discussion and the doctrine there restated that

"where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localties, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation

[1] Constitutional Lim., 732. [2] p. 215. [3] p. 216.
[4] (1888) 125 U. S. 507.

between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." [1]

In that case it was held that a State law could not declare that liquors should not be an article of commerce, and then exclude them, but the usages of the commercial world determined what were commercial articles, and that the right to carry such article into any States must be unrestricted, and not until the importation is completed and the property imported has mingled with and become a part of the general property of the State, can State regulations act upon it.

The right of a State to forbid the manufacture of liquors within its jurisdiction, to be there sold, had been upheld in Mugler *v.* Kansas,[2] on the ground that it was the privilege of the State to determine whether the manufacture or sale of particular articles of traffic would injuriously affect the public, and that Congress had no function to determine what measures should properly be adopted by a State for the protection of the health, safety or morals of its inhabitants.

It was upon the same basis that in Kidd *v.* Pearson,[3] a State statute was upheld as a proper exercise of the State police power and not an interference with commerce between the States, which prescribed that no intoxicating liquor should be manufactured or sold within the State, except for purposes of medicine or use in the arts, and that such liquors could not be there manufactured for the purpose of transportation beyond the limits of the State, and that liquors imported into the State for sale must be sold only in the original packages.

This brings us to the case of Leisy *v.* Hardin,[4] in which a law of Iowa prohibiting the sale of liquors brought into the State was held invalid. The goods had been seized in the original packages in the hands of the importer, and this was pronounced an interruption of a transaction of inter-state commerce, which act of commerce was only complete when

[1] pp. 507–508. Compare with pp. 9–11–12–13 *supra.*
[2] (1887) 123 U. S. 623. [3] (1888) 128 U. S. 1.
[4] (1889) 135 U. S. 100.

the importer had disposed of his goods. The court added that immediately upon such sale, or delivery to another by the importer, the property would then become a part of the common mass of property within the State and subject to its jurisdiction and to the exercise of its police power. But that the attempt to exercise such police power while the property was still legally in transit, and still the object of inter-state commerce, was an interference with the prerogatives of Congress to regulate such traffic.

In this case the authority of the License Cases, decided more than forty years earlier, is stated to be "distinctly overthrown." It had been said in the License Tax Cases that

"Over the internal commerce and domestic trade of the States, Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of power clearly granted by the legislature," and that although "the controlling and supreme power over commerce with foreign nations and the several States, is undoubtedly conferred upon Congress, yet the State may for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress."

Concerning the reasoning of the License Cases, the court, in this later case, says:

"We are constrained to say that the distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids rather than regulations, does not appear to us to have been sufficiently recognized by him (Chief Justice Taney) in arriving at the conclusions announced. That distinction has been settled by repeated decisions of this Court, and can no longer be regarded as open to re-examination. After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the States and the exercise of power over purely local commerce and local concerns." [1]

Shortly following this decision, Congress passed the act known as the Wilson Act of 1890, which provided that all liquors transported into any State or territory should upon arrival be subject to the operation of the laws of the State

[1] p. 118.

"enacted in the exercise of its police powers."[1] This act was under consideration in the Rahrer case,[2] as was also the validity of an Iowa law, which prohibited absolutely the manufacture or introduction of liquor as a beverage.

The validity of the Wilson Act was challenged as being a delegation of the powers of Congress to a State, but it was upheld as being merely a regulation that certain subjects of commerce should remain subject to the exercise of State police powers, and should become subject to such powers at an earlier stage than would have been the case in the absence of the law; and the prohibitory statute of Iowa was said to be clearly an exercise of the police power which had never been surrendered by the State, and was put in use for the general welfare, in restraining the use of articles deemed by the State to be noxious; the court there used this language:

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive.

"And this court has uniformly recognized state legislation, legitimately for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government.[3]

"It is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the National Government, and that in this respect it is not interfered with by the Fourteenth Amendment. Barber *v.* Connolly (1885) 113 U. S. 27, 31."[4]

And in a later case, Rhodes *v.* Iowa,[5] the law was held not to be applicable to liquors which were still in transit at the railway station, although there in the hands of a common carrier, whose route was entirely within the State of Iowa. The goods had been shipped in Illinois and transferred at Burlington, Iowa, to an Iowa railroad; they were seized in the hands of this second carrier and it was held

[1] See cases cited in dissenting opinions Leisy *v.* Hardin, *supra*, pp. 128, 129.

[2] *In re* Rahrer (1891) 140 U. S. 545. [3] p. 554.

[4] Compare opinion Field, J., in Gloucester Case, pp. 574 and 575, *supra*.

[5] (1898) 170 U. S. 412.

that the Iowa law could not apply to such a shipment before its arrival and full delivery to the consignee without being obnoxious to the exclusive right of Congress over inter-state commerce. Three of the justices dissented, considering the decision an infringement upon the police power of the State; and at the same term of court, in Vance *v.* Vandercook,[1] it was held that under the authority of the Wilson Act a law of South Carolina which prohibited the sale within the State of any liquor coming from other States, although in the original packages, was a due exercise of the police power and not an interference with inter-state commerce, as it did not prevent the delivery of the goods to the importer, nor their use by him, but merely prevented their resale by him within the jurisdiction of the State. To this extent at least the police power of the States has been preserved and the attempted exercise of a police power by the Federal Government restricted; the difficulties of the situation are aptly expressed in the opinion of the court in the Matter of Rahrer,[2] quoting from the older case of Brown *v.* Maryland.[3] The court there states that the question of the repugnancy of a State statute to the power to regulate commerce

"involves the distinction which exists between the commercial power and the police power, which 'though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them.'"

We can readily accept this statement of the difficulty when we go back to the expression in the License Cases indicating where the line is to be drawn.

"The assumption is, that the police power was not touched by the Constitution, but left to the States as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts, * * * whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the States. * * * Here is the limit between the sovereign power of the State and the Federal power. That is to say, that which

[1] (1898) 170 U. S. 438. [2] (1891) 140 U. S. 557.
[3] (1827) 12 Wheat. 441.

does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce in within the jurisdiction of the United States." [1]

If the question has not been set at rest, it has not been for lack of effort; although, as the court once had occasion to say:

"It may be admitted that the Court has not always employed the same language and that all the judges of the Court who have written opinions for it may not have meant precisely the same thing." [2]

In O'Neil *v.* Vermont,[3] the plaintiff in error was convicted of selling liquor in Vermont by delivering such liquor to an express company in the State of New York, consigned to parties in Vermont with instructions to collect on delivery. This action was held by the courts of Vermont to be an infraction of a State law prohibiting the sale of liquors within the State and the conviction was upheld. This is another recognition of the police power of a State to prevent the sale of liquor to its inhabitants, even when coming from another State.

It would be tedious to go through all the other cases touching upon this complex and interesting question; it has perhaps already become tedious to go through those which have so far been noticed.

As important as some of these other cases are, I will merely call attention to the Debs case,[4] where as incidental to the dominion of Congress over the mails and over interstate commerce, the defendants were enjoined from obstructing the business of certain railroads, centering at Chicago, and which were both mail carriers and common carriers between the States, and they afterwards were punished for contempt in disobeying the injunction; and to the case *In re* Neagle,[5] in which federal jurisdiction was asserted over Neagle who had committed an assault within the limits and jurisdiction of a State upon the person of Mr. Justice Field. It was in vain contended that the assault was a breach of

[1] p. 599, cited 140 U. S. 557. Compare Gloucester Case, pp. 574 and 575, *supra.*

[2] Fargo *v.* Michigan (1887) 121 U. S. 230, 240; Postal Telegraph *v.* Adams (1895) 155 U. S. 688, 695.

[3] (1892) 144 U. S. 323. [4] *In re* Debs (1895) 158 U. S. 577.

[5] (1890) 135 U. S. 1.

the peace of the State and not of the United States, and that the State was quite able and ready to protect its peace, and to punish the offender precisely as was done with the assassin of the lamented President McKinley by the State authorities at Buffalo.

Another interesting effort to extend the reach of the commerce clause to the domain of a police power is the case of the United States *v.* Knight Co.,[1] in which under the act "to protect trade and commerce against unlawful restraints and monopolies" of 1890, action was taken against a combination of sugar manufactories as being in restraint of the freedom of inter-state commerce. There again it was stated by the court that:

"It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen, in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power.[2]

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."[3]

After this restatement of the imperiled police power of the States, the court concluded that the mere manufacture of goods within a State did not make them articles of inter-state commerce, and that they were not subject to the power of Congress under the commerce clause until they had

[1] (1894) 156 U. S. 1. [2] p. 11. [3] p. 13.

actually become subjects of such commerce, by transportation. This was in 1894.

On the second of March, 1895, Congress passed an Act[1] entitled "an Act for the suppression of Lottery Traffic through national and inter-state commerce and the postal service, subject to the jurisdiction and laws of the United States," and this Act provided that any person who should cause to be "deposited in or carried by the mails of the United States, or carried from one State to another in the United States any paper, certificate, etc., purporting to be or represent a ticket, chance or share, etc., in a lottery, or shall cause any advertisement of such lottery to be deposited in or carried by the mails or transferred from one State to another" shall be punishable by fine or imprisonment or both. Certain individuals shipped lottery tickets by the Wells-Fargo Express from Dallas, Texas, to Fresno, California, and were indicted and put under arrest. The case came before the Supreme Court upon *habeas corpus*,[2] and it was there contended that the Act of Congress was not justified by the constitutional investiture of authority to regulate commerce, but that the intention and purpose of Congress, as plainly stated in the title of the Act, was to suppress lotteries, and that the suppression of lotteries or of any other harmful or supposedly harmful business is essentially an exercise of the police power, expressly reserved to the several States. On behalf of the Government it was contended that the power given to Congress was absolute over all intercourse,[3] and included a right to an absolute prohibition of whatever the Federal Congress considered as immoral or unsafe trade throughout the Republic, in the exercise of a necessary Federal police power which belongs to the Republic.[4]

This contention was upheld by the court with the dissent of four members and the concurrence of five. The argument is made in the opinion that lottery tickets are the subject of interstate commerce, although lottery tickets were, in both of the States mentioned, unlawful and prohibited.

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[1] 28 Stats. 963. [2] Lottery Case (1903) 188 U. S. 321.
[3] p. 337. [4] p. 344.

"We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State at least by independent carriers, is a regulation of commerce among the several States."[1]

In answer to the argument that the statute in question did not regulate nor pretend to regulate the carrying of lottery tickets from State to State, but made such carriage a crime and prohibited it altogether, inflicting fine and imprisonment upon those who should undertake it, the query was:

"Are we prepared to say that a provision which is, in effect, a prohibition of the carriage of such articles from State to State is not a fit or appropriate mode for the regulation of that particular kind of commerce," and "may not Congress for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States?"[2]

The query was answered in the affirmative upon the ground that Congress in enacting that statute shared no doubt the views of the court as theretofore expressed in Phalen *v.* Virginia,[3] that

"The suppression of nuisances injurious to public health or morality is among the most important duties of government," and that "'Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries'" and "that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no State may bargain away its power to protect the public morals, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so."[4]

Congress, it was suggested, under the power to regulate commerce could provide that such commerce should not be polluted by the carrying of lottery tickets, in the same manner that a State could undertake legislation for the suppression of lotteries within its own limits,[5] and that Congress by the act in question had

[1] p. 354. [2] p. 355. [3] (1850) 8 How. 163, 168.

[4] Pp. 355, 356, citing Stone *v.* Mississippi (1879) 101 U. S. 814; Douglas *v.* Kentucky (1897) 168 U. S. 488.

[5] p. 356.

"only legislated in respect of a matter which concerns the people of the United States, * * * for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries.' "[1]

The power was exercised it was said, not in hostility to the State, but supplementing the action of those States which had for the protection of public morals prohibited the drawing of lotteries or the circulation of lottery tickets within their respective limits. It might be suggested that commerce can only be had in the recognized and admitted articles of commerce, as was said in a previous case, articles which universal commercial usage recognizes as the subjects of commerce, and that commerce cannot be predicated of transactions in articles the use of which is branded as a crime. At the same time that the exercise of this power was justified as a means of striking down an immoral traffic, the court says that it is bound to recognize lottery tickets as

"subjects of exchange, barter and traffic, and that whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognized as subjects of commerce are not such."[2]

Until this case shares the fate of many other cases in the same court, and in the course of time is overruled or set at naught, it is a conclusive answer to the question which forms the title to this paper, to wit: "Is there a Federal Police Power?" Indeed it is an answer to a further question suggested by the first. "Does such Federal Police Power, if it exists, trench upon and extinguish the exercise of the State Police Power which the States had supposedly reserved to themselves?" and this also it answers in the affirmative.

But the case did not rest there, and in answer to the suggestion that to uphold the law of Congress in that case would lead necessarily to the conclusion that "Congress may arbitrarily exclude from commerce among the States any article, commodity or thing, of any kind or nature, or however useful or valuable, which it may choose,—no matter with what motive,—to declare that it shall not be carried from one State to another," the court answered: "It will be

[1] p. 357. [2] p. 361.

time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare *the full extent of the power* that Congress may exercise in the regulation of commerce among the States," and then added the comforting assurance that: "The power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution."[1] The dissenting opinion of the Chief Justice, concurred in by three of his associates, concludes that the decision ignores the limitations of the Constitution which should not be "enlarged because of present views of public interest," and considers the law as one passed by Congress "under the pretext of executing its powers to pass laws for the accomplishment of objects not entrusted to the Government," concluding with the statement that the decision is

> "inconsistent with the views of the framers of the Constitution, and of Marshall, its great expounder. Our form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions, the form may survive the substance of the faith."[2]

This might well be considered a finality as to the problem or question suggested as the subject of this paper, and yet Congress has gone farther.

Under an "Act to Prevent Importation of Impure and Unwholesome Tea," passed March 2nd, 1897, solely for the protection of the individual and not necessary to the protection or maintenance of the Federal Government, or for the public safety, the attempt has been made and the power exercised to restrain the liberty of the citizen to trade in tea,—not tea of a deleterious or unwholesome character, but of a certain quality or flavor. Under this law the Secretary of the Treasury is authorized through a Board of Tea Testers to establish the grades of tea, the importation of which shall be permitted, and these gradings are made, not upon the basis of purity or wholesomeness, but upon the basis of quality or flavor.

The question arises under this law, and I cannot con-

[1] pp. 362, 363. [2] pp. 372, 375.

ceive that it can arise in a more complete and conclusive manner, whether the courts may determine the propriety of such an exercise of power by Congress, or whether they must bow to any exercise of a power which has been conceded to be plenary, and to which, although it has been said that it cannot be arbitrary, no limits have been indicated. In the regulation of commerce it is said that Congress may prohibit the importation of all teas, and the query arises whether it may, for the purpose of preserving the health of the citizens of New York, prohibit the importation of tea, admittedly pure and wholesome, but not of a quality or flavor to commend it to the palate of the tea testers appointed by the Secretary of the Treasury to establish a standard of exclusion. Does such legislation come under the protection of the doctrine thus referred to in Powell *v.* Pennsylvania.[1] "If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing the article of food, their appeal must be to the legislature or to the ballot-box, not to the judiciary," or is it to be put under the ban of the Constitution as expressed in the same case, because by such an Act the "legislature under the pretence of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the Supreme Law of the Land." Does it come under the condemnation of the language taken from Smyth *v.* Ames,[2] which tells us that "the idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions,"[3] or, to recur to the suggestion in the Lottery Cases, does it come within what the court there was unwilling to circumscribe: "The full extent of the power that Congress may exercise in the regulation of commerce among the States."[4]

[1] (1887) 127 U. S. 678. [2] (1898) 169 U. S. 466. [3] p. 507.

[4] This case was decided on the 23d day of February, 1904, upholding the constitutionality of the act of Congress. Buttfield *v.* Stranahan, 192 U. S. 470.

RÉSUMÉ.

There seems, on the whole, to have been some difficulty in the establishment of a rule as to the exercise of Federal Police Power, and as to the measure in which such exercise supersedes the police power of the State; the pendulum has oscillated between two extremes and like a self-registering instrument, has left various indications of the prevailing sentiment of the moment; perhaps in this gentle swaying of the instrument lies our security against too rigid a construction of the respective rights and obligations of citizen and State, and central authority; however that may be, my function in this paper will end by an indication of some of the variations which the instrument has registered, leaving the reader to determine whether its action shows any marked trend in one direction, or the happy faculty of meeting the exigencies of the times as these manifest themselves in the universal expression of the popular will and the national needs.

1. All that was within local circumscription was in the power of the State. Its internal regulations or police power was reserved intact.

2. This power was left intact only as applied to matters concerning solely the denizens of a State and was extinct as to the exercise of any legislative function that could reach intercourse with other States or with foreign ports.

3. All police powers, even over means of inter-communication with other States or with foreign ports remained within the province of the State, until Congress saw fit to exercise over the same domain the powers vested in it by the Constitution.

4. The police powers of the State might be exercised upon subjects kindred to inter-state or foreign commerce, so long as they were not a direct interference with such commerce;—incidental interference with some of the agencies of commerce, was not an assumption of powers reserved to Congress.

5. Even when Congress has not made any regulations with reference to the subjects confided to it, the States may not exercise any dominion over such subjects, even in the use of police powers for its internal government, as the

silence of Congress must be taken as an indication that no regulations are to be made with reference to the subject.

6. The police powers of the State are therefore extinct so far as their exercise bears upon any of the subjects entrusted to Congress by the Constitution, notably upon any inter-communication between the States or with foreign parts.

7. In the execution of the powers over commerce and over the mails, Congress may enact laws which regulate internal affairs of States that are in any way dependent upon or connected with communication with the exterior;—such as the introduction into the State of any articles of food, drugs, &c., the control of navigable waters, the protection of health by quarantine laws, &c.

PAUL FULLER.